



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISCELLANEOUS APPLICATION NO. 40 OF 2019

COUNCIL OF GOVERNORS.....OBJECTOR/APPLICANT

VERSUS

NYAKUNDI & COMPANY ADVOCATES.....EXECUTOR/RESPONDENT

RULING

1. The Application before this court is dated 17th January,2022 seeking the following orders;

i. ***THAT*** this Application be certified as urgent.

ii. ***THAT*** the applicant be granted leave to file an objection and a taxation reference to this court against the ruling of the honourable court's taxing officer delivered on 13th day of March 2021 out of the timelines provided in law.

iii. ***THAT*** this Honourable Court be pleased to set aside the Certificate of Taxation issued by the taxing master on the 13th day of March 2021 and the decree issued on 23rd September 2021.

iv. ***THAT*** the leave granted in prayer (2) do operate as a stay of execution of the Certificate of taxation, the decree issued aforesaid and any other consequential proceedings.

v. ***THAT*** the objection to the taxing officer and the application for reference be deemed as duly filed upon payment of requisite fees.

vi. ***THAT*** the costs of this application be provided for.

2. The Application is supported by the Supporting Affidavit of Mary Mwiti the Chief Executive Officer of the Applicant/ Objector sworn on 17th January,2022.

3. The background of the matter is that the Respondent filed an Advocate-Client Bill of Costs dated 9th December,2019, which Bill was taxed at 6,690,912.48 on 13th March,2020. The Court on 30th September, 2021 issued a decree against the judgment debtor for the sum of Kshs. 6,690,912.48 together with interest at 14% p.a. from the date of taxation until payment in full.

4. It is the Applicant's case that an agreement on Legal Fees was entered into and the sum of Kshs. 1,160,000.00/= paid to the Respondent on 27th December,2013 and a further Kshs 450,000.00/= paid on 10th July,2014. The said correspondence evidencing the agreement on legal fees is said to have not been available at the time when the matter was before the taxing master and hence the

reason why it was not produced. The Respondent is also accused of deliberately failing to disclose to the court the existence of the legal fees agreement.

5. Pursuant to a meeting held in the Respondent's office on 3rd December, 2021, it is deposed that the Respondent agreed to confirm the status of the said payments made to the law firm but to date the Respondent has been adamant to confirm whether the payments were made.

6. The Applicant through its CEO argues that the taxation exercise was in breach of the provisions of the Advocates Act, which prohibits taxation where an agreement on legal fees exists. According to the deponent the Applicant in a letter dated 8th December, 2021 to the taxing master requested for a certified copy of the ruling delivered on 13th March, 2022 and reasons for the decision which are necessary for filing of a reference but at the time of swearing the affidavit the same had not been supplied.

7. In response, the Respondent filed a Replying Affidavit dated 25th January, 2022 and a Preliminary Objection dated 26th January, 2022. The Respondent, in its Replying Affidavit states that upon the issuance of the Decree by the Court, it applied for warrants of attachment against the COG which were issued to Moran Auctioneers. The Auctioneers proceeded to attach the assets of the COG and on 8th October, 2021 and issued a 7 days' notice.

8. Upon the expiry of the 7 days the auctioneers proceeded to the said premises as bailiffs but advocate Eugene Lawi summoned administration police officers preventing the said auctioneers from undertaking their duties. Subsequently, the auctioneers approached this court where they obtained orders to be issued with police protection. This notwithstanding the judgement debtor/COG remained adamant forcing the auctioneers to return the warrants to court to prevent an ugly scene from occurring.

9. Mr. Nyakundi avers that he hosted Jane Ogamba, Eugene Lawi and Joyce Chepkoech in a meeting on 3rd December, 2021 in his chambers where they informed him that the taxed bill was contested as there was an agreement as to legal fees to be paid which amount had been fully paid and a deposit on counsel's legal fees for services before the Court of Appeal made.

10. Mr. Nyakundi denies to have received any such payments but in an effort to help settle the matter credit was issued to the COG to the extent of the sums claimed to have been paid provided that the balance of the taxed costs plus interest was paid in two monthly installments starting from 6th December, 2021. Following the Applicant's failure to revert on the same the Respondent/Decree holder notified the Applicant/ Judgment Debtor of its intention to pursue recovery proceedings to conclusion.

11. In a letter dated 6th December, 2021 and received on 9th December, 2021 the COG purported to indicate that in the meeting of 3rd December, 2022, parties had resolved that the Respondent was to confirm the status of payments made by the Council on 27th September, 2013 and 10th July, 2014. It is the Respondent's case that the Applicant deliberately failed to produce before the Court the Respondent's response dated 9th December, 2021 clearly communicating that no resolutions were reached in the said meeting.

12. It is the Respondent's case that upon delivery of the Court's Ruling on 23rd September, 2021, respondent wrote a letter dated 24th September, 2021 to the Applicant informing them of the said decision failure to which execution proceedings would ensue. Subsequently, garnishee proceedings were initiated on 9th December, 2021, a garnishee nisi obtained on 21st December, 2021 and a hearing date for the garnishee to show cause set for 26th January, 2022.

13. A preliminary objection filed by the garnishee was received on 18th January, 2022 and another by the Applicant/COG dated 17th January, 2022 and received on 19th January, 2022 together with a list of authorities of even date. The Respondent is said to have received the Applicant's Chamber Summons application dated 17th January, 2022 together with a Supplementary List of Authorities and Written Submissions dated 24th January, 2022 in response to its application dated 9th December, 2021 on 24th January, 2022. The said act according to the Applicant was intended to obstruct proceedings slated before the Deputy Registrar on 26th January, 2022.

14. It is contended that during all proceedings before the Deputy Registrar and Honourable Judge, the COG was ably represented by advocate Eugene Lawi and given an opportunity to raise any matters and provide any material in support of the position they chose to adopt. Further, that a Preliminary Objection dated 20th January, 2021 was filed opposing a non-existent application allegedly filed by the Respondent herein to frustrate the delivery of a ruling by the Honourable Judge.

15. On several occasions according to the deponent the Applicant was given time to file its pleadings and submissions in support of its case but the same was never done. In addition, it is contended that despite appearing severally before the Deputy Registrar, Mr.

Lawi never raised any of the issues now being raised in the instant application. The law is said to be very clear on what constitutes a valid agreement and what an aggrieved party is entitled to do with regard to a contested certificate of taxation. The Court (Nyamweya J as she then was) also held in her ruling that the issue of a valid agreement ought to have been canvassed before the taxing master.

16. In the Preliminary Objection, the Respondent/ Advocate raises 2 grounds of objection and that is, one, that the matter is *res judicata* and two that in light of the provisions of section 52(2) of the Advocates Act the judgement issued by this court forecloses the issue of the certificate of taxation.

17. In its Supplementary Affidavit sworn on 8th February, 2022 by Eugene Ndoli Lawi, Mr. Lawi denies obstructing the auctioneers from carrying out their duties and having any control whatsoever over the officers attached to the Applicant's offices. He also faults the Respondent's failure to respond to the allegations of payment despite certified copies of bank statements having been produced in the applicant's Supporting Affidavit.

18. The taxing master according to the Applicant erred in principle by failing to take into account all the issues raised in the Applicant's Written Submissions. It is the applicant's case that the matter before this court is not *res judicata* as the same was not an issue before the court at the time.

19. The Applicant herein, filed written submissions on the Respondent's Preliminary Objection dated 26th January, 2022. The Submissions are dated 22nd February, 2022 and one main issue is identified for determination and that is whether the matter before this court is *res judicata*.

20. It is the Applicant's case that the only issue that was canvassed before the taxing master was the issue of payments made and not the existence of a fee agreement and therefore the same cannot be said to be *res judicata*. In support of this argument the case of **Communications Commissions of Kenya & 5 Others v Royal Media Services Limited & 5 Others Consolidated Petition No.14 of 2014** was cited.

21. It is submitted that as the Taxing Master in her Ruling failed to consider the Applicant's written submissions dated 18th February, 2022 the Respondent's averment that the matter of fee payment was finalized and is *res judicata* is misplaced. The case of **Kundan Singh Construction Limited v. Tanzania National Road Agency Appeal No. 14 of 2015** is cited in this regard.

22. The Respondent herein has filed two sets of submissions both of which are dated 26th January, 2022 in respect to the Applicant's application before this court and the other in respect to its Preliminary Objection dated 26th January, 2022.

23. In the first set of submissions the Respondent submits that there has been an inordinate, inexcusable delay on the part of the Applicant and that the application filed before this court is an exercise in futility given the provisions of Section 51(2) of the Advocates Act. The case of **Vishva Stone Suppliers Ltd vs. RSR Stone [2006]** the Court is said to have applied the principles set out in the Supreme Court case of **Nicholas Arap Korari v. IEBC & Others** in determining whether to extend time or not. The decision of Sichale JA in **The County Government of Mombasa v. Kooba Kenya Civil Appeal (Application) No.130 of 2018** where the Court cites with approval the holding in **Karny Zaharya & Another v. Shalom Levi C. Application No.80 of 2018** is also cited on considerations to be borne in mind while dealing with an application for extension of time.

24. In conclusion the Respondent submits that the issue of there being a fee agreement was raised for the first time in the Applicant's Notice of Preliminary Objection dated 25th January, 2021 and as such it is now *res judicata*.

25. In the second set of submissions the Respondent contends that despite the Honourable Judge giving the Applicant several chances to urge the question of the said fee agreement and payments no evidence was adduced and the Judge made findings on the same. It is the Respondent's submission that section 7 of the Civil Procedure Act renders the Application before this Court *res judicata*. The cases of **ANM V PMN HCC Civil Case No.14 of 2015** and **The Independent Electoral & Boundaries Commission v. Maina Kiai & Others [2017] eKLR** are cited on the doctrine of *res judicata*.

26. It is submitted that the Applicant makes an inaccurate reference to dates on which the decision by the taxing officer was made. Instead of referring to the decision of 5th March, 2020 it refers to the decision of 13th March, 2020 which is fatal to its application of 17th January, 2022. The Garnishee's argument that the Applicant is a Government is also denied and the case of **Greenstar Systems**

Limited v. KICC & Cooperative Bank of Kenya & Another cited in this regard where the Court held as follows;

*“From 2015 when the Arbitration commenced to the point of execution the Applicant has always participated and held itself out as a body corporate and **not** as a Government department or agency. It is too late in the day for the Applicant to now seek to don a different coat. Its invocation of the **Government Proceedings Act** is but a last ditch attempt to scuttle the execution proceedings against it. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the **Government Proceedings Act** as a challenge to execution against it.”*

ANALYSIS AND DETERMINATION

27. I have had due regard to the application, the response thereto and submissions filed by the parties, I find that the only issue for determination is whether the Applicant has laid out a case for the grant of Orders sought in the instant Application.

28. I will begin by determining the Respondent's/ Decree Holder's Preliminary Objection dated 26th January, 2022 which has the potential of disposing of the Applicant's Notice of Motion before this court if upheld.

29. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, had the following to say on circumstances when a Preliminary Objection may be raised.

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

30. The Respondent/Advocate in this case contends that the issues raised by the Applicant in its application are *res judicata* and that in light of section 52(2) of the Advocates Act forecloses the issue of the certificate of taxation.

31. This assertion is borne out of the fact that a certificate of taxation dated 13th March 2020 was issued by the taxing master. By way of a notice of motion dated 9th March 2020, the advocate sought judgement against the client for the sum of Ksh 6,690,902.48 together with interest from 6th September 2013 until payment in full. In its Preliminary Objection dated 20th January, 2021, the Applicant/Client raised the following issues;

i. THAT this court has no jurisdiction to grant the Orders sought by the Applicant as the taxing master misdirected himself in taxing an advocate/client Bill of Costs that was subject to a fee agreement.

ii. THAT the taxing officer acted contrary to the provisions of the Advocates Act Chapter 16 of the Laws of Kenya in assessing the costs at Kshs. 6,690,902.48

32. The Court (Nyamweya J as she then was) in her Ruling dated held as follows on the first issue;

“9. The fact of a valid agreement must therefore be established before the jurisdiction of the taxing master is ousted b section 45(6) of the Advocates Act, and this ground cannot therefore be raised as a pure question of law in a preliminary objection. In any event, the proper forum to raise such an objection is before the taxing master and not this Court, whose jurisdiction is limited to hearing and determining references challenging decisions of taxing masters under the procedure provided by Rule 11 of the Advocates Remuneration Order.

10. The Client/Respondent did not bring any evidence of having urged the issue of existence of a fee agreement with the Advocate/Applicant before the taxing master, to now purport to raise it before this Court as a preliminary objection. The Client/Respondent's Notice of Preliminary Objection dated 20th January 2021 is therefore found not to have merit for these reasons.

33. A plain reading of the findings by the court clearly shows that the question whether there was an agreement on fees between the client and advocate was placed before the court by the client for determination and the court dutifully addressed the same and made a determination. The issue thus is *res judicata* and the client is estopped from raising it before this court.

34. On the second issue the Court held as follows;

“12. It is an established position of law that the only reason that a court of law cannot enter judgment on a Certificate of Costs is if the same has been set aside or altered, or where there is an issue with retainer. This position has been upheld in various cases including Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited (supra), Dally and Figgis Advocates vs Homelex Limited (2003) eKLR AND Evans Thiga Gaturu Advocates vs Kenya Commercial Bank Ltd (2002) eKLR. In addition, Rule 7 of the Advocates Remuneration Order provides for interest on the said costs as 14% payment in full.

13. In the present application, it is not in dispute that the Advocate/Applicant’s Bill of Costs dated 9th December 2019 was taxed as between the Advocate/Applicant and Client/Respondent in the sum of Kshs.6,690,912.48, and there is a Certificate of Taxation dated 13th March, 2020 on record certifying the said taxation. It is also noteworthy that the Client/Respondent’s advocate participated in the said taxation proceeding and filed submissions dated 18th February 2020 which are also on record. In addition, based on the record before the Court and the conduct of the parties in this matter, it is evident that there existed an advocate/client relationship between the parties herein at all material times.

14. Lastly, the Client/Respondent has not brought any evidence of any pending dispute as regards the amount of taxed costs. As the taxed costs and Certificate of Costs issued to the Advocate/Application dated 13th March 2020 has not been challenged, and there is no demonstrated dispute on the Advocate/Applicant’s retainer, the taxed costs and certificate of Costs issued to the Advocates/Applicant are therefore deemed to be final, and the said applicant is thus entitled to judgment.

15. In the premises I find merit in the Advocate/Applicant’s Notice of Motion dated 9th March, 2020 and grant the following orders:

I Judgement is entered for the Advocate/Applicant against the Client/Respondent for taxed costs of Kshs.6,690,912.48, as certified in the Certificate of Taxation dated 13th March, 2020, with interest at 14% per annum from the date of taxation until payment in full.

II The Applicant shall have costs of the Notice of Motion dated 9th March, 2020 of Kshs.20,000/=

“16. In the present application, it is not in dispute that the Advocate/Applicant’s Bill of Costs dated 9th December 2019 was taxed as between the Advocate/Applicant and Client/Respondent in the sum of Kshs 6,690,912.48, and there is a Certificate of Taxation dated 13th March 2020 on record certifying the said taxation. It is also noteworthy that the Client/Respondent’s advocate participated in the said taxation proceeding and filed submissions dated 18th February 2020 which are also on record. In addition, based on the record before the Court and the conduct of the parties in this matter, it is evident that there existed an advocate/client relationship between the parties herein at all material times.

17. Lastly, the Client/Respondent has not brought any evidence of any pending dispute as regards the amount of taxed costs. As the taxed costs and Certificate of Costs issued to the Advocate/Applicant dated 13th March 2020 has not been challenged, and there is no demonstrated dispute on the Advocate/Applicant’s retainer, the taxed costs and Certificate of Costs issued to the Advocate/Applicant are therefore deemed to be final, and the said Applicant is thus entitled to judgment.”

35. According to this extract of the ruling, the court made a finding that there was no dispute as regards the amount of taxed costs and that the advocate was entitled to judgement. This judgement, as correctly put by the advocate forecloses the issue of the certificate of taxation by dint of section 52 (2) of the Advocates Act. This issue was also addressed with finality by the court and cannot be reopened as the client now purports to do. Once judgement was entered, the issue of setting aside the certificate of taxation cannot arise.

36. The net result is that the preliminary objection dated 26th January 2022 has merit. I allow the same and proceed to dismiss the application by the client dated 17th January 2022 with costs to the Advocate.

Dated, signed and delivered at Nairobi this 28th day of April 2022.

A. K. NDUNG'U

JUDGE



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